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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

22 CR 673 (LAK)

5 SAMUEL BANKMAN-FRIED,

6 Conference

7 Defendant.

8 -----x

9 New York, N.Y.  
10 July 26, 2023  
11 2:15 p.m.

12 Before:

13 HON. LEWIS A. KAPLAN,

14 District Judge

15 APPEARANCES

16 DAMIAN WILLIAMS

17 United States Attorney for the  
18 Southern District of New York

19 DANIELLE SASSOON

20 NICOLAS ROOS

21 SAMUEL RAYMOND

22 THANE REHN

23 DANIELLE KUDLA

24 Assistant United States Attorneys

25 COHEN & GRESSER LLP

Attorneys for Defendant

26 BY: MARK STEWART COHEN

CHRISTIAN R. EVERDELL

27 SULLIVAN & CROMWELL, LLP

Attorneys for FTX Debtors

28 BY: NICOLE FRIEDLANDER

29 ALSO PRESENT: KRISTIN ALLAIN, FBI Special Agent

JOSH ROTHMAN, Pretrial Services Officer

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1 (Case called)

2 THE DEPUTY CLERK: Government, are you ready?

3 MS. SASSOON: Yes.

4 Good afternoon, your Honor. Danielle Sassoon, for the  
5 United States, and I am joined by my colleagues, Nicolas Roos,  
6 Sam Raymond, Thane Rehn, and Danielle Kudla. We are also  
7 joined at counsel's table by Kristin Allain, a special agent  
8 with the FBI.

9 THE COURT: Good afternoon, all.

10 THE DEPUTY CLERK: Please be seated.

11 Defendant, are you ready?

12 MR. COHEN: Yes.

13 Your Honor, good afternoon. Mark Cohen,  
14 Cohen & Gresser, for the defendant.

15 THE COURT: Mr. Cohen.

16 MR. EVERDELL: Good afternoon, your Honor. Christian  
17 Everdell, for the defendant.

18 THE COURT: Mr. Everdell.

19 Okay. Ms. Sassoon, your dime.

20 MS. SASSOON: Your Honor, as you know, we submitted a  
21 proposed order to govern extrajudicial statements in this case,  
22 and today, we are seeking the detention of the defendant.

23 THE COURT: Okay.

24 MS. SASSOON: The record here, going back to the first  
25 instance of attempted witness tampering with the FTX U.S.

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1 general counsel up through now, this latest attempt to  
2 discredit Caroline Ellison and intimidate witnesses through the  
3 New York Times, supports the conclusion that no set of release  
4 conditions can assure the safety of the community.

5 The defendant has shown now that he is intent on  
6 exploiting the conditions of release and improperly influencing  
7 this trial and prospective witnesses, regardless of the  
8 conditions that are in place.

9 In this posture, it's the government's view that it is  
10 not possible to design an adequate set of release conditions.

11 The government rejects the defense's version of events  
12 and the assertion that the defendant did nothing wrong here,  
13 and so I'd like to begin by describing the recent facts, as the  
14 government understands them, and then place them in the broader  
15 context of the pretrial release overall.

16 THE COURT: Go ahead.

17 MS. SASSOON: So the defense has described a toxic  
18 media environment that they say leaves the defendant with  
19 little choice but to respond. We disagree with both the  
20 characterization of the media environment and the supposed  
21 propriety of the conduct here.

22 As you know, there was a recent New York Times article  
23 that quoted from private writings Ellison had shared with the  
24 defendant. While the defense notes that the story had other  
25 sources, it appears to be undisputed that the defendant is the

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1 one who supplied the private documents quoted in the article.

2 The defendant did not only respond with comment or  
3 with an assertion of innocence, he provided documents not in  
4 the public record, that the Court has not deemed admissible at  
5 trial, and, in the government's view, for no other purpose than  
6 to discredit Ms. Ellison. As we've written, it's harassing of  
7 a government witness, threatens to taint the jury pool, and has  
8 a chilling effect on other witnesses in this case.

9 That is not responding for comment. It is  
10 affirmatively placing what the defendant plainly considered  
11 materials damaging to Ms. Ellison in the hands of a reporter.  
12 And, in the government's view, it is irrelevant if the ultimate  
13 article was not as unflattering to Ms. Ellison as the defendant  
14 would have wanted.

15 But this notion that the defendant was merely  
16 contacted for comment by The New York Times on a story in  
17 progress and against the backdrop of a toxic media frenzy is  
18 also misleading. While this case has attracted significant  
19 attention by the media, that is in no small part due to the  
20 defendant's own conduct beginning before his arrest, but after  
21 the collapse of FTX.

22 As your Honor knows, the defendant went on a media  
23 tour after FTX's collapse, and during his pretrial release, he  
24 has been far from a passive observer amid a deluge of press  
25 coverage.

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1 As the defense knows and the Court knows, the  
2 defendant has maintained a pen register on the defendant's  
3 phone and email during his release, and he has not only  
4 received outreach from journalists, but he has sent over 100  
5 emails to various journalists who have been reporting on this  
6 case, and he has had more than 1,000 phone calls with various  
7 journalists and more than 100 calls with the author of the  
8 article in question, dating back months, and many of those  
9 calls were for around 20 minutes.

10 I also want to note that the defendant has made much  
11 of the fact that before this article, there was an article in  
12 May by the same author, that referred to Ms. Ellison's private  
13 writings. In light of the nature of what was reported there  
14 and the continuous communication with the author of that  
15 article, the government has every reason to believe that he was  
16 a source for that article as well, which noted that the  
17 government and the defendant's attorneys had declined to  
18 comment.

19 This latest incident, though, is an escalation of an  
20 ongoing campaign with the press that has now crossed a line.

21 I would also note that the defendant's calls and  
22 visitor log show substantial communication with the author,  
23 Michael Lewis, who has a book poised for publication right at  
24 the start of this trial. He's had over 500 calls with Michael  
25 Lewis, who has also visited the residence. And the

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1 government's now concerned about what material was provided to  
2 Mr. Lewis that will be published on the eve of trial, as we are  
3 selecting a jury.

4 I would also note that when the defendant contacted  
5 the FTX USGC, your Honor noted that the encrypted message  
6 said -- suggested a phone call.

7 THE COURT: I didn't get the acronym you gave me. FTX  
8 USGC?

9 MS. SASSOON: General counsel.

10 THE COURT: Ah, thank you.

11 MS. SASSOON: In that message, the defendant had  
12 suggested a phone call, which your Honor noted would permit  
13 undetected communication. Here, I think it's notable that,  
14 while the defendant has had substantial email and phone contact  
15 with journalists, it was during an in-person meeting that he  
16 shared these materials with the press. While there is a  
17 visitor log that has been maintained, the defendant knew his  
18 phone was being monitored, he knows that the government had  
19 already searched his email account, and he chose to share these  
20 materials in person at a meeting that could not be monitored,  
21 and in a situation where, although there's a visitor log that's  
22 maintained, it is not routinely maintained by the probation  
23 office, it's not in the possession of the government, but is  
24 held by this private security firm, and the government only  
25 received it upon request, after we learned about this incident.

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1           What I think that shows is, even if you take away the  
2 internet or the phone with this defendant, where there is a  
3 will, there is a way, and, here, there's certainly a will.

4           I would also note that the defense letter mentioned  
5 that Ms. Ellison is likely going to be crossed on topics  
6 similar to what was reported on in this article. But the Court  
7 has not, at this point, deemed these particular documents  
8 admissible, and when the government asked for copies from the  
9 defense, they indicated that they have yet to decide whether  
10 they are marking these as exhibits, and so they declined to  
11 provide the documents to the prosecution team, offering,  
12 instead, to provide the documents to the government's filter  
13 team to assess whether they were in the discovery or not.

14           THE COURT: Well, typically, documents are used for  
15 cross that have not previously been identified as exhibits,  
16 yes?

17           MS. SASSOON: That's true, your Honor, but, at this  
18 point, we don't know whether there will be a proper impeachment  
19 basis for cross-examining Ms. Ellison with these documents. I  
20 expect that there are things that she will readily acknowledge  
21 that are going to be the subject of cross-examination, and so  
22 we don't know that these documents are prior inconsistent  
23 statements or what the admissible basis for those documents  
24 would be.

25           THE COURT: Okay. Continue.

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1 MS. SASSOON: The last thing I'll note in responding  
2 to the defense's letter is: There's much made of the  
3 statements by John Ray or statements by the government. I  
4 don't think there's any assertion here that the government has  
5 done anything but comply with Rule 23.1, and, as your Honor  
6 knows, John Ray is not a party to this case, and the government  
7 does not intend to call him as a witness in this case. And  
8 that really does not address the core issue here, which is the  
9 propriety of providing Ms. Ellison's private writings to The  
10 New York Times.

11 I'd now like to take a step back and talk about the  
12 backdrop of the defendant's pretrial release.

13 Back in January, the government brought to the Court's  
14 attention the defendant's history of obstruction in the form of  
15 setting autodeletion for much of the records that were  
16 maintained by FTX and the communications among FTX and Alameda  
17 employees.

18 In January, the defendant initiated contact with the  
19 FTX USGC, and your Honor indicated that the Court understood  
20 this to be an invitation for witness one to align his views and  
21 recollections with the defendant's version of events. Then the  
22 defendant used a VPN, which permitted him to use the internet  
23 without it being traced to his IP.

24 And after these events, at the February 17th  
25 conference, your Honor put the question to the government,

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1 you're putting an awful lot of trust in him, aren't you? And  
2 at that time, the government was proceeding more incrementally,  
3 but, in the end, we've concluded that these conditions did  
4 place too much trust in the defendant. And some of the very  
5 conditions insisted on by the defense for the purpose of  
6 defense preparation are precisely those that have been abused.  
7 Specifically, your Honor had been considering restricting the  
8 defendant's use of the internet, and defense counsel said that  
9 they needed access to Google Docs and Google Drive for the  
10 defendant to be able to collaborate with his attorneys on his  
11 defense, and it's precisely his Google Docs and Google Drive  
12 that appears to have been mined for material to provide to The  
13 New York Times.

14 So, for all these reasons, the government submits that  
15 there is no set of conditions short of detention to assure the  
16 safety of the community.

17 THE COURT: Talk to me about the legal basis for your  
18 request, please.

19 MS. SASSOON: Yes, your Honor.

20 In *LaFontaine* — I believe this case was cited in your  
21 preliminary order on bail — the Court recognized that even  
22 nonviolent witness tampering can be a basis for detention. And  
23 your Honor echoed that idea in *Stein*, in a case where your  
24 Honor ultimately did not detain the defendant, but recognized  
25 that nonviolent witness tampering is a basis for detention.

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1 And, as your Honor knows, under 18 U.S.C.  
2 3142(f)(2)(B), the Court can consider a serious risk that the  
3 person will obstruct or attempt to obstruct justice or  
4 threaten, injure, or intimidate, or attempt to threaten,  
5 injure, or intimidate a perspective witness or juror.

6 Your Honor also noted at a prior bail conference that  
7 if there is probable cause to believe that the person committed  
8 a felony, there's a rebuttable presumption of detention. When  
9 your Honor raised that, the parties put forward conditions  
10 that, at the time, we believed could overcome the presumption,  
11 and, in light of the defendant's exploitation of those  
12 conditions, we no longer think that presumption has been  
13 overcome under 18 U.S.C. 3148.

14 THE COURT: Well, the crime that you say I have  
15 probable cause to believe that the defendant has committed is  
16 witness tampering under --

17 MS. SASSOON: 18 U.S.C. 1512.

18 THE COURT: You took the words right out of my mouth.  
19 Just give me a moment.

20 (Pause)

21 THE COURT: So let's walk through the elements.

22 MS. SASSOON: Yes, your Honor.

23 I noted to my colleague as we got here that I failed  
24 to bring a codebook. I don't know if your Honor has them  
25 handy, and I apologize for being underprepared in that respect.

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1 THE COURT: Isn't that the first rule in the U.S.  
2 Attorney's Office, never go to court without the rulebook?

3 Do we have an extra here?

4 THE DEPUTY CLERK: I do not have an extra, but I can  
5 get another one.

6 THE COURT: Well, I'm going to keep mine, but would  
7 you kindly get us another one.

8 MS. SASSOON: Thank you, your Honor.

9 (Pause)

10 MS. SASSOON: Although I don't have the statute in  
11 front of me, I think, at bottom, the government would have to  
12 prove an attempt to influence the testimony of a witness when  
13 there is a pending court proceeding. And in the circumstance  
14 of the FTX USGC, the message referred to having a constructive  
15 relationship and vetting their version of events, which your  
16 Honor described, quite colorfully, as a request to sing from  
17 the same hymn book.

18 With respect to this New York Times article, I think a  
19 fair conclusion is also that the only intent or explanation for  
20 sharing these private writings was to intimidate Ms. Ellison,  
21 who's poised to testify in approximately two months, and to  
22 send a warning to other potential witnesses in this case  
23 considering testifying against the defendant.

24 Thank you, Andy.

25 THE COURT: Okay. Just take a minute.

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1 So it's 1512(b)(1).

2 MS. SASSOON: So I think here, with respect to the FTX  
3 USGC, I would characterize the communication as an attempt to  
4 corruptly persuade the FTX USGC in order to influence his  
5 potential testimony, and I think the second instance involves  
6 both indirect corrupt persuasion, but also intimidation.

7 THE COURT: So, in each case, it's (b)(1)?

8 MS. SASSOON: Yes.

9 THE COURT: Okay.

10 Is that the sole legal basis, or is there another one?

11 MS. SASSOON: May I have a moment?

12 (Pause)

13 MS. SASSOON: That's what we're relying on, your  
14 Honor.

15 THE COURT: Okay.

16 Have you concluded?

17 MS. SASSOON: Yes, your Honor.

18 THE COURT: All right.

19 Who is going to take this for the defense?

20 MR. COHEN: I will, your Honor.

21 THE COURT: Okay.

22 MR. COHEN: Thank you, your Honor.

23 I want to start with a process point. We were sent a  
24 letter by the government on Thursday seeking an order under  
25 Rule Local Rule 23.1(h). Knowing how prompt your Honor is, we

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1 worked over the weekend to respond to that application, and we  
2 learned for the first time, one minute before court began, that  
3 the government had changed its position and was moving for  
4 detention. Had we known that, we would have been able to put  
5 in a written submission for your Honor to consider and for  
6 record purposes. And if the Court is inclined to rule in that  
7 direction, we would like the opportunity to put in a  
8 submission. That was just not a proper process to follow,  
9 given that we all knew we would be before your Honor on  
10 Wednesday, today.

11 In any event, let's start with the bail reform statute  
12 and the part of the statute that counsel did not read of  
13 3142(f)(2)(B), which requires that on a motion by the  
14 government for detention, or actually for modification of bail,  
15 based on risk of obstruction of justice, as they describe it,  
16 that they make a showing that the finding the Court needs to  
17 make is by clear and convincing evidence, not by a  
18 preponderance. Counsel did not address that, and we  
19 respectfully submit, your Honor, that, yet again, from the  
20 government, which dropped three documents on our desk one  
21 moment ago -- never sent them to us yesterday --

22 THE COURT: What documents are those?

23 MR. COHEN: They claim to be, I believe, the printouts  
24 from the pen registers, your Honor. I haven't had a chance to  
25 study them. I just got them.

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1           The record before your Honor is no different than it  
2           was based on the parties' submissions of Thursday and Saturday.  
3           And on that record, we submit there is a question if there has  
4           ever even been a violation of 23.1(a) or (d), and our view, as  
5           we said in our letter, is rather than require the Court to wade  
6           into that, when the Court has plenty else to do, that we would  
7           consent to the relief of a 23.1(h) order. And the way that  
8           ties into the bail argument, your Honor, is that is a  
9           sufficient, least restrictive alternative to address the  
10          concern that the government has raised here. And as of, as far  
11          as I know, yesterday, that was the government's position. As  
12          of one minute before court, that was the government's position.

13           On the record before your Honor, we submit that  
14          nothing more has changed. The defendant did not violate the  
15          protective order. That's not disputed.

16           The defendant did not try to directly contact any  
17          witnesses. And, of course, for record purposes, as your Honor  
18          knows, we dispute the government's characterization about the  
19          prior contact involving the FTX GC, which your Honor addressed  
20          last time -- well, several times ago.

21           And the standard under 23.1 requires a finding of a  
22          substantial likelihood to interfere. Now, it could be  
23          argued --

24           THE COURT: We're not now talking about 23.1. We're  
25          talking about 3148(b)(1)(A), as I understand it.

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1 MR. COHEN: That's correct.

2 THE COURT: And correct me if I'm mistaken or  
3 misreading it, but the standard under 3148(b)(1)(A) is probable  
4 cause to believe that the person has committed a crime while on  
5 release.

6 MR. COHEN: Right. But --

7 THE COURT: The clear and convincing standard does not  
8 apply to that. Am I right?

9 MR. COHEN: The government is moving -- they just said  
10 they're moving under 3142(f) for modification, and that's --  
11 the clear and convincing standard is in that same section, your  
12 Honor. That's all I was pointing out.

13 THE COURT: Well, I think, possibly, there's a  
14 misunderstanding here.

15 MR. COHEN: Okay. All right.

16 THE COURT: Let me find out.

17 MR. COHEN: Okay.

18 THE COURT: Ms. Sassoon, are you proceeding under  
19 3148(b)(1)(A), or are you proceeding under the other statute?

20 MS. SASSOON: I think we fall under either, your  
21 Honor.

22 THE COURT: Okay.

23 Then go ahead, Mr. Cohen.

24 MR. COHEN: On the record before your Honor -- not  
25 innuendo that the government, yet again, dropped before the

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1 Court today – but on the record before your Honor, what we have  
2 here is a defendant who believes – and this may or may not be a  
3 good strategy, in terms of trying to protect one's reputation –  
4 who believed that, given the many, many negative stories,  
5 1 million stories out there, most of them overwhelmingly  
6 negative about him, given the literally thousands of stories  
7 about Ms. Ellison and his relationship already in the public  
8 domain, already put forward by the government – some of it in  
9 the indictment itself, similar quotes in the indictment  
10 itself – he believed that as long as he was not violating the  
11 protective order, which he wasn't, as long as he was not trying  
12 to directly contact any witness, which he wasn't, that he had  
13 the right, under the First Amendment, to make fair comment.

14 Now, that might be a good strategy, it might not be a  
15 bad strategy. The fact that the stories continue to be  
16 negative about him might suggest it's not the best strategy,  
17 but it doesn't rise to the level of a violation of 1512, and it  
18 doesn't negate the need for the Court to apply the least  
19 restrictive alternative here, which is the gag order that the  
20 government has proposed, which we thought we were going to be  
21 considering today, put it in place, and eliminate this risk.

22 The other thing I wish to note – and I don't usually  
23 do this, your Honor – the government has given the back of the  
24 hand to the fact that it appears that in the article in  
25 question, the government itself is one of the sources. And I

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1 think if one were to ask the many reporters sitting in this  
2 room now, and hearing on the overflow, if they have had  
3 government sources over the life of this case --

4 THE COURT: They would all decline to answer, as we  
5 all well know.

6 MR. COHEN: They would, they would.

7 What's ironic here is, your Honor, our client did it  
8 in a way that complied with his bail conditions so his contacts  
9 would be known.

10 There's a log. Reporters signed in on the log.  
11 There's no secret to this. The calls, he knew there was a pen  
12 register, we knew there was a pen register. He believed that  
13 he had a right --

14 THE COURT: What documents did he give them?

15 MR. COHEN: Your Honor, these were documents not part  
16 of the discovery, that were exchanged between him and  
17 Ms. Ellison. I think it's one page, maybe two pages. And he  
18 didn't give them to the reporter; he let the reporter look at  
19 them.

20 Now, this is a level of detail, your Honor, no one  
21 else would provide to the Court. If you brought the reporter  
22 in here, they would not answer you, they wouldn't have to. The  
23 government is pretending that it never speaks to the media  
24 about this case. The Court has done this a long time. I'll  
25 leave that to the Court to consider.

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1           It's just when you step back, and you look at the  
2 context, I would grant, your Honor, that if we were on a blank  
3 slate, and this was a run-of-the-mill case, and there weren't a  
4 million stories, and the defendant started to make contacts  
5 like this, we would be having a very different kind of argument  
6 and a very different kind of situation. But to pick out this  
7 one story, which, for all the innuendo, is all the government  
8 is relying on, and say this is an --

9           THE COURT: Well, it isn't all. There's the contact  
10 with the U.S. general counsel, which troubled me a great deal.

11          MR. COHEN: I understand that, your Honor. Although  
12 that was, with respect, inconclusive, and he made it at the  
13 same time that he also contacted John Ray, the CEO of the  
14 debtor and who's trying to reach out to them.

15          So, what we have here, I say with respect, is not some  
16 sinister effort to move an overwhelmingly negative tide against  
17 him, but just someone who's trying his best to protect his  
18 reputation, believing that he can. He consented to  
19 extradition. He's asserted his innocence from the beginning.  
20 He pleaded not guilty. We asked your Honor for an early trial  
21 date, which your Honor was kind enough to give us.

22          I forget the case the quote comes from, but where do  
23 you go to get your reputation back if you prevail at trial? It  
24 might be a good strategy, it might be a bad strategy, but it's  
25 a permitted strategy to respond to this wave of inquiries and

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1 try to protect your reputation and try to move forward.

2 The notion that this could have tainted the jury pool  
3 really just doesn't seem viable in light of all that's gone on.  
4 And the notion that this really rises to the level of a 1512  
5 violation, or even probable cause to believe that, this is a  
6 very thin record, especially if we're thinking about it from a  
7 clear and convincing -- they're moving to a different statute.

8 In any event, your Honor, when you step back, and you  
9 look at what we're dealing with, what the defendant is dealing  
10 with, with the overwhelming crush of media, almost all of it  
11 negative, when you look at his effort to follow the protective  
12 order, his effort to follow his conditions down to the point of  
13 having the reporter sign and filing all the records, we submit  
14 that the way to address this is with a less restrictive  
15 alternative.

16 Now, if I might, your Honor -- and I just want to touch  
17 this briefly --

18 THE COURT: There are lots of less restrictive  
19 alternatives. One of them is to do nothing at all, which is  
20 less restrictive, but also highly ineffective. And one of the  
21 questions bothering me here is how effective this proposed  
22 order from the government could conceivably be in these  
23 circumstances.

24 MR. COHEN: Well, your Honor, I'm glad you asked that  
25 question, because I think what the government has proposed is a

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1 23.1(h) order, which, as far as we can tell, would be a full  
2 gag order.

3 Now, interestingly, although in their letter, they  
4 described it to your Honor as covering parties and witnesses,  
5 in the draft they sent to your Honor, they dropped the  
6 witnesses.

7 THE COURT: But, of course, I have no authority to  
8 enjoin witnesses.

9 MR. COHEN: Well, you don't --

10 THE COURT: I don't even know who they are.

11 MR. COHEN: I'm not sure if your Honor doesn't  
12 under --

13 THE COURT: Well, I commend to your attention Learned  
14 Hand's decision in *Alemite Manufacturing* --

15 MR. COHEN: Yes, yes.

16 THE COURT: -- which says that I can't issue an order  
17 against the world.

18 MR. COHEN: In any event, that order will be a full  
19 gag order. There will be no more communication, which,  
20 frankly, in the real world we're living in, will only be to my  
21 client's disadvantage and to his reputational disadvantage, for  
22 all the reasons I discussed.

23 THE COURT: Look, I was going to put this question --  
24 and I still will -- to Ms. Sassoon, but what happens if somebody  
25 is alleged to have violated what you refer to as the gag order?

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1 What's the remedy?

2 MR. COHEN: I assume -- if the gag order is now made  
3 part of a bail condition, I assume it's an application like  
4 today. Right?

5 THE COURT: Well, that's a possibility.

6 MR. COHEN: Right.

7 THE COURT: That's not the usual --

8 MR. COHEN: But it's certainly within the Court's  
9 discretion to craft that.

10 THE COURT: Yes, of course, that's true.

11 And then the argument gets made that it was vague,  
12 right?

13 MR. COHEN: I don't see how that order, as drafted, is  
14 vague, since it tracks the local rule, which is, as your Honor  
15 knows --

16 THE COURT: It wouldn't be the first time.

17 MR. COHEN: I know, but it follows the model rule. So  
18 where you have it on consent of the parties, and the Court so  
19 ordering a consented order, it's hard to see --

20 THE COURT: But what is a communication about the case  
21 which could interfere with a fair trial? So the government  
22 comes in and says, hypothetically, revoke bail because he did  
23 this, and it, quote, could interfere with a fair trial. And  
24 you will say, I predict, who knows what could interfere with a  
25 fair trial. No?

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1 MR. COHEN: Well --

2 THE COURT: And you will say it's vague, how would  
3 anybody understand it?

4 MR. COHEN: We're not saying it's vague, and in our  
5 submission to your Honor, we did not challenge on vagueness.  
6 We would like to get to -- and maybe this helps your Honor --

7 THE COURT: That goes to vague on its face. What if  
8 you say, well, it's not vague on its face, it's merely vague as  
9 applied to this communication?

10 MR. COHEN: Well, I think where we're trying to get  
11 to, your Honor -- and maybe it's a drafting question -- is at  
12 this point, going forward, we want our client to be able to  
13 work with his defense team, continue his review of the  
14 discovery, have social visits with his friends that are on the  
15 approved list that we've worked out with the government --

16 THE COURT: Well, they haven't been approved yet.

17 MR. COHEN: I mean the prior list, assuming the Court  
18 decides to continue that. That's, obviously, the Court's  
19 decision.

20 -- and speak with his parents, and that's it.

21 So, if that order doesn't get us there, we would be  
22 amenable to language that did, because one point your Honor has  
23 touched on -- and I'm glad you reminded me, I did want to make  
24 this point, your Honor -- is that this is a very unusual case in  
25 a lot of ways. One way in which it's unusual, besides the

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1 media coverage, is the nature of the discovery. Ironically, in  
2 a government press conference -- I know we shouldn't be bringing  
3 up government sources -- they described it as the most extensive  
4 discovery production they've ever made.

5 We've received 4.3 million documents, 13 million  
6 pages. If this was physically printed out, it would be the  
7 size of three Sears Towers -- or Willis Tower. I'm sorry, I'm  
8 dating myself.

9 The only way our client, who is integral to our  
10 defense -- and it's meaningful for him to participate in his  
11 defense -- can work with this is on an internet written-abled  
12 computer that, among other things, allows him to use the  
13 Relativity program. He would not be able to do this if he were  
14 remanded. In fact, one of the reasons the government gave in  
15 its papers for why a bill of particulars wasn't required here  
16 is because they said, we've produced to you documents that,  
17 even though they're voluminous, they're organized and  
18 searchable. The searchable goes away if he's remanded, or  
19 perhaps could be replicated with some sort of hard drive, which  
20 would take literally weeks to produce and put together, when we  
21 have an October 2 trial date.

22 Second, all of the trading records and accounting  
23 records -- and this is a financial case -- are on the AWS  
24 database. And I know your Honor has heard a lot about this,  
25 probably more than you'd care to, but that's hosted in the

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1 cloud. So if our client is remanded, he can't access it, and  
2 we can't access it with him.

3 Third, there is a bunch of discovery that the  
4 government has provided to us that they've labeled attorneys'  
5 possession only. We got a 60-page disclosure from the  
6 government about potential *Brady* issues. Our client can only  
7 read that with us, with attorneys present, and if he's  
8 remanded, it's possible — I'm not saying it's not — but it  
9 becomes dramatically more difficult, and we expect that much of  
10 the 3500 material that your Honor has ordered to be produced on  
11 a tight schedule will also be designated that way, making it  
12 even more difficult.

13 So, this is a complex case, involving complex  
14 financial transactions. It really would be very, very --  
15 almost impossible, as I see it, to work with our client if he  
16 were remanded and not able to have the basic access.

17 So we respectfully would ask the Court to deny the  
18 application and put forth an order, however strict the Court  
19 determines is required, so that we can just put this issue  
20 behind us. Your Honor has appropriately given us a scheduling  
21 order that I'm sure both sides are committed to meeting, and  
22 that's where we should be putting our attention, and that's  
23 where our client should be putting his attention, and he  
24 understands that at this point.

25 And to the extent the Court is inclined otherwise, we

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1 would like a chance to make a written submission, if necessary.

2 THE COURT: All right. Thank you.

3 Ms. Sassoon?

4 MS. SASSOON: A couple of points, your Honor, and I'm  
5 happy to address any outstanding questions.

6 In terms of the insinuation that the government was  
7 hiding the ball here, that's not accurate. The Court put out  
8 an order asking the parties to be prepared to address bail. It  
9 was no secret that that would be a topic at this conference,  
10 and the government put in a letter on Monday saying that we'd  
11 arrive prepared to address the bail conditions, and at no point  
12 did defense counsel reach out to understand the government's  
13 position, even when the government reached out for the visitor  
14 log. And this has been an evolving --

15 THE COURT: There is, in fact, a little more to it  
16 than that. The government brought this on by a letter dated  
17 July 20th, and Mr. Everdell communicated with my deputy, saying  
18 that I would have a response from the defense by the end of the  
19 day on the 21st. And my initial order raised the prospect of  
20 bail being on the table.

21 I didn't get it on the 21st. Then I was told late on  
22 the 21st that I would get it on the 22nd. And you were  
23 anticipating that, I'm sure, and it never came on the 22nd, or  
24 it came very late on the 22nd, and it didn't address the bail  
25 issue.

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1 MS. SASSOON: I believe it did at the very end, your  
2 Honor.

3 THE COURT: Did it?

4 MS. SASSOON: And my recollection is defense counsel  
5 submitted it in the evening on the 22nd, and filed it on the  
6 23rd.

7 THE COURT: Ah, that's why I think I didn't see it  
8 until the 23rd. Okay.

9 Yes, but it was really a cursory addressing of the  
10 bail issue.

11 MS. SASSOON: And from the government's point of view,  
12 this was not a static situation. We learned of the forthcoming  
13 article, the article was published, we wanted to alert the  
14 Court right away, and we did in the form of requesting this  
15 order at a time where we still did not have the handle on all  
16 the facts that we've presented today, we didn't have the  
17 benefit of the defense position, an explanation that, in their  
18 view, the defendant did nothing wrong, and we didn't, at that  
19 point, have the benefit of analyzing the pen register and  
20 visitor log, which, in our view, also changed the equation  
21 because it showed more than a hundred calls with this  
22 particular reporter, including before the preceding article in  
23 May that also referenced Ms. Ellison's writing, in which, in  
24 our view, gives the lie to this narrative of the defendant  
25 merely responding to comment on an article that was already

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1 effectively baked.

2 In terms of the order, I take your Honor's point that  
3 it's subject to competing interpretations and, standing alone,  
4 is not going to be effective, given the record that we have  
5 here. Were the defendant to violate the order, I think  
6 possible remedies are criminal contempt, if it's a willful  
7 violation, and that could be established, or if it's made a  
8 part of the bail conditions, if it's a proved violation of his  
9 bail, it creates a possibility for remand.

10 There was a lot of discussion about the voluminous  
11 discovery here. And as your Honor knows, the government took  
12 steps to accommodate discovery review and coordination with  
13 counsel in designing the prior bail conditions. But that's not  
14 a get-out-of-jail-free card, it's not an exception to the bail  
15 statute or to the considerations that a court should give  
16 weight to in deciding on the appropriate conditions of release,  
17 or whether release is possible to assure the safety of the  
18 community. And I think it would set a dangerous precedent to  
19 keep the defendant on release purely on the basis of discovery.  
20 That would basically send a message that white collar  
21 criminals, because their cases tend to involve more voluminous  
22 discovery, have more leeway to interfere with a fair trial or  
23 to tamper with witnesses. And the government has plenty of  
24 experience coordinating with the MDC and the other prisons to  
25 get access to discovery to detained defendants.

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1 THE COURT: You're proceeding, essentially, by  
2 proffer.

3 What, if any, facts are disputed?

4 MS. SASSOON: I think in this case, the key things are  
5 not disputed, which is the language of the message to the FTX  
6 USGC, and that the material quoted in The New York Times  
7 article was provided by the defendant in person to the  
8 reporter.

9 THE COURT: Well, I'm just told that it was one or two  
10 pages. Is that accurate, or do you not know?

11 MS. SASSOON: We don't know because the defense has  
12 declined to provide us with the material.

13 Based on the article, it appears that there was more  
14 than one document that was previewed to the journalist.

15 THE COURT: Stay with the question I raised.

16 What's disputed and what isn't?

17 MS. SASSOON: I think the interpretation of the  
18 conduct is disputed, but very little else is disputed. The  
19 defense indicated it needs time to assess the call log records  
20 we provided. The FBI agent who prepared those records is here  
21 in court, and it's drawn straight from the pen register being  
22 maintained by the FBI.

23 THE COURT: Okay. Anything else?

24 MS. SASSOON: No, your Honor.

25 THE COURT: Mr. Cohen, anything else from you?

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1 MR. COHEN: Only, your Honor, that --

2 THE COURT: Same question to you that I put to  
3 counsel.

4 MS. SASSOON: That's the one I was addressing.

5 It's not just the interpretation, but I would put it  
6 slightly more broadly, your Honor -- it's the reason for the  
7 contact.

8 THE COURT: Are you proffering the document or  
9 documents themselves?

10 MR. COHEN: Your Honor, we were willing to, and remain  
11 willing to, provide them to the government's filter team for  
12 review.

13 May I have a moment, your Honor?

14 THE COURT: Yes.

15 (Counsel confer)

16 MR. COHEN: We would certainly be willing to provide  
17 them to the Court if the Court wanted to see them.

18 THE COURT: Ex parte or --

19 MR. COHEN: I would think, at this point, we would  
20 prefer ex parte to the Court, and then also to the filter team  
21 if they want to see them, because, under your Honor's  
22 scheduling order, we're not required to make a production yet,  
23 and these are documents we may or may not provide, but  
24 certainly to resolve this issue, we'd be willing to provide  
25 them to the Court.

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1 THE COURT: The purpose of having it go to the filter  
2 team is what?

3 MR. COHEN: It's so that someone from the government's  
4 side can see them, where, if we don't use them at trial, the  
5 trial team doesn't have them. That was our thinking with  
6 respect to the filter team.

7 THE COURT: But, normally, the filter team is used  
8 where something is already deemed privileged, where there's  
9 going to be a privilege determination.

10 MR. COHEN: This is the analogue, your Honor. These  
11 are documents that, under your Honor's order and under 16(b),  
12 we may never have to provide to the defense. So our preference  
13 would not be to unless and until the date comes, but in the  
14 meantime, if it's to resolve this issue, we'd be happy to  
15 provide them to the Court and to the filter team.

16 THE COURT: The government is asking me to draw an  
17 inference here about what was provided. And you're asking me  
18 to draw a different inference. That's at the minimum. The  
19 government also wants me to find that there was a lot more  
20 provided to The New York Times reporter than one or two pages.

21 Certainly, on the first of those points, don't you  
22 have an interest in the government seeing it and seeing whether  
23 they really dispute your assertion, or not?

24 MR. COHEN: One moment, your Honor?

25 (Counsel confer)

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1 MR. COHEN: We would be willing to provide them the  
2 documents, your Honor.

3 THE COURT: Well, I leave it up to you. We'll get to  
4 talking about a schedule here in a minute.

5 Ms. Sassoon, does the government's case on this boil  
6 down to something like this, or is there more to it? We have  
7 the communication with the U.S. general counsel months ago,  
8 which I then thought, and still think, gives good reason to  
9 suspect that the purpose was to influence the testimony of that  
10 individual. You have the admission that the defendant has a  
11 strategy here to counter what he puts forward as being  
12 extremely unfavorable publicity about him, and it could be  
13 inferred to -- well, let me not go to the next step because I  
14 needn't make this more complicated. So that there is,  
15 essentially, an avowed intention to influence the perception of  
16 the defendant by the public at large, which includes  
17 prospective jurors and prospective witnesses. That's  
18 essentially admitted, as I understand the argument.

19 And now you learn, since July 20th, of the  
20 extraordinary amount of contact between the defendant,  
21 journalists in general, and the author of this particular New  
22 York Times article, the conceded making of availability of  
23 these documents, however many they are, to the author. Let me  
24 just stop there.

25 And you say, in light of the new facts, there's

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1 probable cause to believe he's engaged in witness tampering and  
2 conceivably also created a justification for revocation under a  
3 different statute.

4 Does it boil down to that? And if there's more, what  
5 else is there to it?

6 MS. SASSOON: Yes, your Honor. I just want to be  
7 clear that the defendant is permitted to have a strategy, and  
8 this isn't a First Amendment issue, and having contact with the  
9 press alone is not witness tampering, and it's not a violation  
10 of the bail statute. But, here, where the strategy for  
11 rehabilitating his reputation was built on discrediting and  
12 blaming Caroline Ellison in a national and international  
13 publication, that is read by many prospective jurors in this  
14 district, it crossed a line toward improperly influencing those  
15 prospective jurors and intimidating a witness and sending a  
16 message to other prospective witnesses.

17 And against the backdrop of the prior admonitions, the  
18 other indications of evasion, including the use of a VPN, and  
19 then conducting this meeting with the journalists on background  
20 or off the record — I don't know what the right term is — and  
21 in person, it also rehabilitates the concerns that your Honor  
22 had at the outset, when the government thought we had come up  
23 with conditions that could be adequate.

24 THE COURT: All right. Let's talk about getting this  
25 teed up.

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1 First of all, would there be any objection, from  
2 either side, to an interim order to give both sides an  
3 opportunity to make more formal presentations, and using, as a  
4 starting point, the government's proposed order, but striking  
5 out the words "anything about the case which could interfere  
6 with a fair trial," to avoid uncertainty?

7 Any objection to that, purely pendente lite?

8 MS. SASSOON: I just want to understand the edit.  
9 We'd be striking the words "which could interfere with a fair  
10 trial"?

11 THE COURT: Yes. That amends what I said, but I think  
12 that's better.

13 MS. SASSOON: Yes, your Honor, no objection to that.

14 MR. COHEN: No objection, your Honor.

15 THE COURT: All right.

16 Now, who should go first with a written submission? I  
17 suppose the government, right?

18 MS. SASSOON: Yes, your Honor.

19 THE COURT: How quickly can you get it done, properly?

20 MS. SASSOON: We'd propose Friday or tomorrow, if your  
21 Honor prefers tomorrow.

22 THE COURT: Friday is okay with me.

23 Now, when I say "properly," I didn't mean to suggest  
24 that you don't always do things properly – both sides do – but  
25 what I mean is with careful attention to the statute or

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1 statutes you're proceeding under, and all of the case law that  
2 is pertinent to proceeding by proffers, and when a hearing is  
3 required and when it isn't. And that's addressed to both  
4 sides, obviously.

5 So, the government by Friday.

6 And, Mr. Cohen, what would you like?

7 MR. COHEN: Would we be able to respond by Tuesday,  
8 your Honor?

9 THE COURT: Is there any objection to that?

10 MS. SASSOON: No, your Honor.

11 THE COURT: Tuesday is what date, please? I should be  
12 able to figure that out for myself.

13 THE DEPUTY CLERK: August 1st, Judge.

14 THE COURT: August 1st.

15 And any reply, August 3rd, how about that? Yes?

16 MS. SASSOON: Yes.

17 THE COURT: Okay.

18 What I'm going to do with the proposed order, I'm  
19 adding a paragraph to the order that reads: "This order shall  
20 remain in effect until determination of the government's oral  
21 application for detention unless extended by the Court."

22 Is that satisfactory?

23 MS. SASSOON: Yes, your Honor.

24 MR. COHEN: Yes.

25 THE COURT: All right. So I'll enter that when I get

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1 upstairs.

2 Is there anything else we need to do?

3 MS. SASSOON: We'd request that the defense provide us  
4 with the documents today so that we have an opportunity to  
5 address them in our letter.

6 THE COURT: Any reason why not, Mr. Cohen?

7 MR. COHEN: We have a technical issue, but we should  
8 be able to work through it and get it to them today, your  
9 Honor.

10 MS. SASSOON: Great.

11 THE COURT: Okay.

12 Let me just say a word or two.

13 I'm aware, I think pretty fully, about the document  
14 issues and the need for access by the defendant. I am  
15 certainly very mindful of his First Amendment rights, and I am  
16 very mindful of the government's interest in this issue, which  
17 I take seriously. And I say to the defendant,  
18 Mr. Bankman-Fried, you better take it seriously, too.

19 Okay. I think we're concluded for this afternoon.  
20 Thank you, all.

21 (Adjourned)